Aone & Ors v Public Prosecutor

HIGH COURT (PULAU PINANG) — CRIMINAL APPLICATION NO 41–164 OF 1996
JEFFREY TAN J
10 JUNE 1997

Criminal Procedure *— Bail bond — Forfeiture of — Failure to produce fishing vessel released on bond — Burden on appellant to satisfy court that full sum should not be forfeited — Whether whole sum of penalty ought to be enforced*

Eight Thai nationals were charged at the magistrate's court for an offence under s 15(1)(a) of the Fisheries Act 1985. The magistrate's court ordered that the fishing vessel be released on a bond of RM75,000 in one surety and that the vessel be produced when so required by the court. The appellant executed a bond and surety and the magistrate court released the vessel to the appellant. On 22 April 1994, the eight Thai nationals pleaded guilty to the s 15(1)(a) offence. The appellant failed to produce the vessel to the court and the magistrate court issued a notice to show cause to the appellant. After the show cause proceedings, the magistrate ordered the forfeiture of the bond of RM75,000. The appellant appealed.

Held, dismissing the appeal:

(1) The bond for the production of the vessel was of no less a serious nature. The appellant must produce the vessel when so called upon by the magistrate's court. Since the appellant could ensure the production of the vessel, then reasonably, the burden of the appellant of satisfying the magistrate's court that the full sum should not be forfeited was heavier than that of a surety to the attendance of an accused at his trial or appeal (see pp 621H–622A).

(2) The magistrate had put her signature on both bond and surety. This must mean that the magistrate had personal knowledge of the bond and surety entered into by the appellant. The magistrate had personal knowledge that the appellant had failed to produce the vessel on 22 April 1994 and thereafter. Together, the personal knowledge of the bond/surety and personal knowledge of the fact to produce the vessel were enough to enable the magistrate's court to forfeit the bond and there was no need for any further record of grounds of proof (see p 622B–C).

(3) Section 404(5) of the Criminal Procedure Code states that the court has a discretion to remit any portion of the penalty mentioned, and enforce payment in part only. Still, the magistrate's court by not modifying the prima facie

position was not wrong, because the circumstances were such that the whole sum of the penalty ought to be enforced (see p 622H–I).

(4) Given that the eight Thai nationals had pleaded guilty to the s 15 offence and so an offence under the Fisheries Act was undoubtedly proved, the magistrate's court was more than justified in ordering, 'Bot tersebut diperintahkan untuk diserahkan untuk membuat rampasan setelah diperintah di bawah Akta Perikanan'. In the normal course, the vessel would have been there to be forfeited. And the vessel would have been there to be forfeited, if the appellant had honoured his solemn bond to produce the vessel. The reason why the appellant could not produce the vessel was brought about entirely by the appellant, because he willingly handed over the vessel entrusted to him under his solemn bond to keep safe and properly maintained at all times to others, in breach of his solemn bond (see p 623F–G).

[Bahasa Malaysia summary

Lapan rakyat negara Thai telah didakwa di mahkamah majistret untuk satu kesalahan di bawah s 15(1)(a) Akta Perikanan 1985. Mahkamah majistret telah memerintah bahawa bot perikanan tersebut dilepaskan atas ikatan sebanyak RM75,000 dalam satu jaminan dan agar bot tersebut dikemukakan apabila dikehendaki berbuat demikian oleh mahkamah. Perayu telah melaksanakan suatu ikatan dan penjamin dan mahkamah majistret melepaskan bot tersebut kepada perayu. Pada 22 April 1994, lapan rakyat negara Thai tersebut mengaku salah terhadap kesalahan di bawah s 15(1)(a). Perayu telah gagal mengemukakan bot tersebut dan mahkamah majistret mengeluarkan satu notis tunjuk sebab kepada perayu. Selepas prosiding tunjuk sebab, majistret memerintah supaya ikatan sebanyak RM75,000 disita. Perayu membuat rayuan.

Diputuskan, menolak rayuan:

(1) Ikatan untuk pengemukaan bot tersebut tidak boleh dipandang ringan. Perayu mesti mengemukakan bot tersebut apabila diminta berbuat demikian oleh mahkamah majistret. Oleh kerana perayu boleh memastikan pengemukaan bot tersebut, maka secara munasabah, beban pada perayu untuk memuaskan mahkamah majistret bahawa jumlah penuh tidak harus disita adalah lebih berat daripada beban ke atas jaminan kehadiran seseorang tertuduh di perbicaraan atau rayuannya (lihat ms 621H–622A).

(2) Majistret telah meletakkan tandatangannya pada kedua-dua ikatan dan penjamin. Ini mestilah bermakna bahawa

majistret mempunyai pengetahuan peribadi mengenai ikatan dan penjamin yang diikat oleh perayu. Majistret mempunyai pengetahuan peribadi bahawa perayu telah gagal mengemukakan bot tersebut pada 22 April 1994 dan selepas itu. Secara bersama-sama, pengetahuan peribadi mengenai ikatan/penjamin dan pengetahuan peribadi mengenai keperluan untuk mengemukakan bot tersebut adalah cukup untuk membolehkan mahkamah majistret menyita ikatan tersebut dan tiada keperluan untuk membuat rekod lanjut tentang alasan bukti (lihat ms 622B–C).

(3) Seksyen 404(5) Kanun Acara Jenayah menyatakan bahawa mahkamah mempunyai budi bicara untuk meremit mana-mana bahagian penalti yang disebut dan menguatkuasakan sebahagian bayaran sahaja. Namun begitu, mahkamah majistret dengan membiarkan kedudukan prima facie tidak terkhilaf, kerana keadaan-keadaan di sini adalah demikian hinggakan jumlah keseluruhan penalti haruslah dikuatkuasakan (lihat ms 622H–I).

(4) Memandangkan bahawa lapan rakyat negara Thai tersebut telah mengaku salah terhadap kesalahan di bawah s 15 dan dengan itu satu kesalahan di bawah Akta Perikanan jelas terbukti, mahkamah majistret memang berjustifikasi dalam memerintahkan, 'Bot tersebut diperintahkan untuk diserahkan untuk membuat rampasan setelah diperintah di bawah Akta Perikanan'. Dalam keadaan biasa, bot tersebut seharusnya boleh dirampas. Dan bot tersebut sepatutnya boleh dirampas, andainya perayu telah menepati janjinya yang bersungguh-sungguh untuk mengemukakan bot tersebut. Alasan mengapa perayu tidak dapat mengemukakan bot tersebut pada keseluruhannya dicetus oleh perayu sendiri, kerana beliau secara rela menyerahkan bot tersebut yang diamanahkan kepadanya di bawah janji yang bersungguh-sungguh untuk menjaga dan mengekalkannya dengan wajarnya pada semua masa kepada orang lain, bertentangan dengan janjinya yang bersungguh-sungguh itu (lihat ms 623F–G).]

Notes

For cases on forfeiture of bail bond, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 654–669.

Cases referred to

Khor Ewe Suan & Anor v PP [1964] MLJ 220 (refd)
PP v Tanggaah (No 2) [1972] 1 MLJ 223 (refd)
R v Knightsbridge Crown Court [1980] Cr LR 715 (refd)
R v Southampton Justices; ex p Green [1976] 1 QBD 11 (refd)

A *R v Waltham Forest Justices; ex p Parfrey* [1980] Cr LR 571 (refd)
Valliamai v PP [1962] MLJ 280 (refd)
Yap Yin Kok v PP (Wong Ee Tay as surety) [1988] 1 MLJ 237 (refd)

B **Legislation referred to**

Criminal Procedure Code ss 404, (5), 407(4), 413, Form XLII
Fisheries Act 1985 s 15(1)(a), 25(a), 34, 52

C **Appeal from:** Arrest Case No 83–205 of 1993 (Magistrate's Court, Pulau Pinang)

Surinder Singh (*Ong & Manecksha*) for the appellant.
Salim (Deputy Public Prosecutor) for the respondent.

D **Jeffrey Tan J**: This is an appeal by the surety ('appellant') against the order of the Balik Pulau magistrate's court ('the magistrate's court'), of 19 July 1996, forfeiting his bond of RM75,000.

The background facts, all elicited from the petition of appeal, the
E grounds of judgment, the notes of proceedings, the notice to surety to show cause dated 18 December 1995, and the submission of counsel, are as follows Eight Thai nationals ('Aone and seven others') were charged, at the magistrate's court, for the following offence under s 15(1)(a) of the Fisheries Act 1985 (Act 317) ('Act') and punishable under s 25(a) of the
F same said Act.

> Bahawa kamu bersama-sama pada 7 Oktober 1993, jam lebih kurang 12.30 tengahari, di dalam vesel penangkapan asing yang bernama SUTIN VARE 31-9200466, di kedudukan Lat 05 35.70' Utara dan Long 99 21.25' Timur, jarak 50 batu nautika dari Muka Head, Pulau Pinang, di dalam Negeri Pulau
G Pinang, di perairan perikanan Malaysia, telah didapati menangkap ikan tanpa kebenaran perjanjian antara Kerajaan Malaysia dan permit dari Ketua Pengarah Perikanan Malaysia, maka dengan ini kamu semua telah melakukan kesalahan di bawah s 15(1)(a) Akta Perikanan 1985 dan boleh dihukum di bawah s 25(a) Akta yang sama.

H On 9 January 1993, the magistrate's court ordered, pursuant to s 407(4) of the Criminal Procedure Code ('CPC'), that, the fishing vessel 'Sutin Vare 31-9200466' (vessel) be released on bond. On 2 February 1994, the magistrate's court 'telah memutuskan' that the vessel be released on a bond of RM75,000 in one surety, that that surety be a local resident,
I and that the vessel be produced when so required by the court. A day later, on 3 February 1994, the appellant executed the following bond and surety:

Bond

No Kes: 83–205/93
Tarikh: 3 Februari 1994

Mahkamah Majistret
Balik Pulau
Pulau Pinang.

Bond untuk Mengemukakan Kenderaan dll di bawah seksyen 413 Kanun Acara Jenayah

Bahawa saya SAW BAN BENG K/P No 4603654 yang beralamat 52, Concord 9, 11200 Tanjung Bungah, Pulau Pinang dengan ini berikrar dan dengan ikhlasnya mengisytiharkan bahawa bot menangkap ikan yang bernombor 31–92–0466 'SUTIN VARE' kepunyaan SAW BAN BENG yang sedang berada di dalam tahanan Pejabat Perikanan bersabit dengan kes no 83-205/93.

Bahawa saya dengan ini juga bersetuju untuk mengambil bot tersebut dengan tertakluk kepada syarat-syarat seperti berikut:

(a) Butir-butir bot:
  (i) Keadaan kulit bot sederhana dan boleh digunakan.
  (ii) Ukuran kulit bot panjang 19.75m, lebar 5.78m, dalam 2.63m.
  (iii) Muatan 84.96 CRT
  (iv) Jenis enjin dan kuasa kuda Volvo (Sedan) TD 120-35612614 (280 kk)
  (v) Keadaan enjin sederhana.

(b) Bahawa saya tidak akan menawarkan untuk disewa atau dipinjam kepada sesiapa pun.

(c) Bahawa saya tidak akan menjualkannya atau menukarkan miliknya tanpa kebenaran mahkamah.

(d) Bahawa saya tidak akan mengubah atau menukarkan mana-mana bahagiannya.

(e) Bahawa saya adalah bertanggungjawab terhadap menyimpan dengan selamatnya dan akan menjaganya supaya ianya boleh diselenggarakan pada setiap masa.

(f) Bahawa saya akan mengemukakan pada bila-bila masa yang dikehendaki oleh mahkamah atau pihak Jabatan Perikanan.

(g) Bahawa saya akan mengadakan seorang surety sebanyak RM75,000 (Ringgit: Tujuh puluh lima ribu sahaja) kepada Kerajaan Malaysia — MBB No 107086202515.

....
(Tandatangan Pemilik) Jurubahasa Majistret

Surety

Bahawa saya SAW BAN BENG K/P No 4603654 yang beralamat di 52, Concord 9, Tanjung Bungah, Pulau Pinang dengan ini mengikat diri saya sebagai surety kepada Penama tersebut di atas, dan mengaku akan mengemukakan bot bernombor 31–9200466 'Sutin Vare' mengikut syarat-syarat yang tersebut di dalam Bond ini. Jika sekiranya ia melanggar syarat-

A syarat itu, maka saya adalah terikat dengan jaminan ini untuk dirampas oleh Kerajaan Malaysia sejumlah, Ringgit: Tujuh puluh lima ribu sahaja (RM75,000)

....
(Tandatangan surety) Jurubahasa Majistret

B

Tarikh: 3 Februari 1994.

Secured with bond and surety, the magistrate's court then released the vessel, on 3 February 1994, to the appellant who had declared in the aforesaid bond that the vessel was his property. On 22 April 1994, C Aone and seven others pleaded guilty to the s 15(1)(a) offence. On 22 June 1994, the magistrate's court forfeited the bond of RM75,000, because of the appellant's failure to produce the vessel to the court on 22 April 1994. However, that order was set aside by the High Court (not this court). Then, on or about 18 December 1995, the magistrate's court issued the following D 'notice to show cause' to the appellant.

Notice to Surety for Breach of Bond Malaysia, State of Penang

In the matter of AONE DAN 7 ORANG LAGI
And
In the matter of Magistrate's Court Arrest No 83–205–93

E To Saw Ban Beng,
52, Concord 9,
11200 Tanjong Bungah,
Pulau Pinang.

Whereas on the 3 February 1994, you became surety for one boat 31–92– F 00466 'Sutin Vare' that he should produce before the magistrate's court at Balik Pulau, Penang when called upon and to continue to produce the boat until otherwise directed by the court and bound yourself in default to the Government of Malaysia the sum of RM75,000.

And whereas the said Saw Ban Beng has failed to produce the boat before the said court on the 22 April 1994 and by reason of such default you have G forfeited the aforesaid sum of RM75,000.

You are required to pay the said penalty or show cause why payment of the said sum should not be enforce against you.

Further you are hereby required to appear before the Magistrate Court sitting at Balik Pulau, Penang on the 24 January 1996 at 9.00 am. Given under my hand and the seal of the Court this 18 December 1995. H

Signed
Magistrate, Balik Pulau.

With regard to the ensuing show cause proceedings, the appellant was I examined on oath, on 17 April 1996 (see pp 14–16 of the appeal record), and the magistrate's court ordered the forfeiture of the bond of RM75,000, on 19 July 1996.

Mr Surinder Singh for the appellant contended, that the notice to surety 'was drawn without taking evidence on [the bond] as to its forfeiture' and that 'occasioned a failure of jurisdiction'. He said, that the magistrate's court must serve a notice on the bailor, and that was not done. 'The procedure is s 404 of the CPC'. 'An order for forfeiture cannot be made unless evidence on oath [has been taken]'. 'Alternatively, the magistrate erred in holding that the court cannot reduce the sum to be forfeited.' 'The boat [had become] a wreck.'

Mr Ahmad Fairuz for the respondent contended however that the procedure is s 413 of the CPC. The appellant stood surety that the vessel would be produced if required. 'The appellant gave his bond. The appellant took a risk.' When the vessel was not produced, the bond was forfeited. It was forfeiture of the full sum.

With respect, 'the relevant provisions relating to forfeiture of a bond are in s 404 of the CPC, which provides for 'any person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid'. This makes it clear that, upon sufficient cause shown, forfeiture may be waived altogether, while sub-s (5) states in specific terms that the court has a discretion to 'remit any portion of the penalty mentioned, and enforce payment in part only'. Careful consideration, therefore, ought to be given by magistrates to the question in two stages, first, has sufficient cause been shown against forfeiture; secondly, if not, are the circumstances such that the whole sum of the penalty ought to be enforced' (*Valliamai v PP* [1962] MLJ 280, per Ong J (as he then was)).

Evidence should be led producing the actual bail bond and stating that the bailors were the persons who entered into the bond. Bailors should be given an opportunity to cross-examine the witness who produce the actual bail bond and to show cause why their recognizance should not be forfeited. Bailors should be invited to go into the witness box and state their case, if they so wish, calling any further evidence which they require (*Khor Ewe Suan & Anor v PP* [1964] MLJ 220).

'Section 404 of the CPC deals with the procedure on forfeiture of a bond and that provision being of a penal nature has to be strictly construed. The court acts without jurisdiction if it forfeits the bond without recording the grounds of proof that a bond had been forfeited' (*PP v Tanggaah (No 2)* [1972] 1 MLJ 223, per Sharma J).

But Sharma J promptly added, in *Tanggaah*, where the bond was for the appearance of the accused before the court and the records (ie the order for bail) being before the court, as follows:

> that the bail bond and the fact that there was a failure to appear was enough to enable the court to forfeit the bond and there need not be any further record of grounds of proof. A notice, however, had to be sent to the bailor as envisaged in s 404(1) and as exemplified in Form XLII in the second schedule to the Criminal Procedure Code.

A 'The extent of the surety's obligation under the bond is determined by the terms of the bond. A surety is no different from a guarantee given in a civil contract' [*R v Southampton Justices; ex p Green* [1976] 1 QBD 11).

> In respect of the obligation of the surety to procure the attendance at his trial or appeal, it cannot be emphasized too strongly or frequently that the
B obligation is a very serious one. Donaldson LJ (as he then was) had these observation to make in *R v Waltham Forest Justices; ex p Parfrey* [1980] Cr LR 571:
>
> > 'The obligation entered into by someone who enters into a recognizance as a surety is a very serious obligation indeed. I hope that
> C nothing I say today will suggest the contrary. There is an obligation on a surety to be fully satisfied that he or she can meet the liability which will arise if the accused person does not surrender to his it is. The unhappy event of arrested persons not surrendering happens frequently. There is a real risk. Indeed it is difficult to conceive of a set of circumstances in which a surety can be absolutely sure that the accused will surrender to his bail. So let no one think that this is an obligation
> D which can be entered into lightly. Furthermore, the burden of satisfying a court that the full sum should not be forfeited is a very heavy one, so again let no one think that they can simply appear before the magistrate and tell some hard luck story, whereupon the magistrate will say, "Well be more careful in the future". We are not dealing with that character of obligation at all.'

E In *R v Knightsbridge Crown Court* [1980] Cr LR 715, Donaldson LJ said:

> It has been said by this court, and by other courts, time and again, that entering into suretyship (going bail for someone, to use the common
F phrase) is an extremely serious matter not to be lightly undertaken, and those who go on bail must understand that, if the accused fails to surrender to his bail, it is only in the most exceptional cases that the court will be prepared to modify the prima facie position, which is that the amount for which the person concerned has stood surety will be forfeit in full.

G Thus, because of the serious nature of the obligation, it cannot be said:

> the mere fact that every effort to secure the appearance of the accused man had been made and that there was no want of diligence involved the proposition that the amount of the obligation should be remitted entirely.

H per Donaldson LJ in *Ex parte Parfrey*; (*Yap Yin Kok v PP (Wong Ee Tay as surety)* [1988] 1 MLJ 237).

So much for the law. With regard to the facts of the case, the bond was for the production of the vessel. Still, the obligation was of no less a serious nature. The appellant must produce the vessel when so called upon by the
I magistrate's court. Except, that the appellant could ensure that the vessel, an inanimate object, would be produced whenever required by the magistrate's court, unlike a surety to the attendance of an accused at his trial

or appeal who cannot be absolutely sure that the accused will surrender to his bail (*Ex parte Parfrey*). And since the appellant could ensure the production of the vessel, then reasonably, the burden of the appellant of satisfying the magistrate's court that the full sum should not be forfeited was heavier than that of a surety to the attendance of an accused at his trial or appeal.

Again with regard to the facts of the case, the learned magistrate of the magistrate's court had put her signature on both bond and surety. This must mean, surely, that the learned magistrate had personal knowledge of the bond and surety entered into by the appellant. And of course, the learned magistrate had personal knowledge that the appellant had failed to produce the vessel on 22 April 1994, and thereafter. Together, synergistically, the personal knowledge of the bond/surety and personal knowledge of the fact that there was a failure to produce the vessel were enough to enable the magistrate's court to forfeit the bond, and there was no need for any further record of grounds of proof (see *Tanggaah*).

A notice (see notice reproduced above), within the framework of Form XLII in the second schedule to the CPC, was then sent to the appellant (see p 13 of the appeal record). And the appellant appeared at the magistrate's court, on 17 April 1996, to answer the notice to show cause. And in the show cause proceedings, the appellant admitted on oath, that he 'ada menjamin sebuah bot', 'ada menandatangani bon tersebut', and 'saya faham isi kandungan bon tersebut. However, he said, probably so that the magistrate's court would modify the prima facie position, that the vessel, 'telah rosak dan tidak dapat di bawa ke mahkamah. Ianya telah rosak selepas digunakan ... Bot tersebut tidak digunakan lagi. Vesel tersebut di Thailand'. He also said, that he went to Thailand, on several occasions, but failed, but not for want of effort, to bring back the vessel.

In the event, the magistrate's court held that it had to forfeit the amount in full 'kerana ia merupakan harga semasa bot tersebut semua di lepaskan di bawah jaminan'. The magistrate's court explained, in its grounds of judgment, 'Bot tersebut diperintahkan untuk diserahkan untuk membuat rampasan setelah diperintah di bawah Akta Perikanan. Mahkamah tidak mempunyai kuasa untuk menimbangkan perkara ini kerana surety terpaksa menerima risiko perkara ini'.

However, the magistrate's court was obviously in error in holding that 'Mahkamah tidak mempunyai kuasa untuk menimbangkan perkara ini', given that s 404(5) of the CPC states that the court has a discretion to 'remit any portion of the penalty mentioned, and enforce payment in part only'. Still, the magistrate's court by not modifying the prima facie position was not wrong, because the circumstances were such that the whole sum of the penalty ought to be enforced.

The appellant declared to the magistrate's court (see para 1 of the bond) that he was the owner of the vessel. That, apparently, was a lie, as the appellant testified at the show cause proceedings — the effect of his testimony was that he was not the owner of the vessel — that he was the shipping agent. Indeed, the appellant produced a document (ID2) stating the vessel belonged to Preechasamut & Co Ltd of 59, Kittikun Road, Kantang, Thailand (see p 23 of the appeal record). Inter alia, the appellant solemnly undertook (see conditions (b) to (f) of the bond) that he will not offer the vessel for rent, that he will not sell or transfer the vessel without the court's consent, that he '*adalah bertanggungjawab terhadap menyimpan dengan selamatnya dan akan menjaga supaya ianya boleh diselenggarakan pada setiap masa*', and that he will produce the vessel whensoever required by the court or the Fisheries Department. But the appellant's candour or sincerity was highly suspicious, because in the month he entered into his solemn bond he handed over the vessel to others who took the vessel to Thailand, to a place beyond the court's jurisdiction. And he permitted the vessel, despite his solemn bond that he would keep it safe and would maintain it properly at all times, to be used in a foreign land, and used, according to the appellant, until it became a total wreck.

Besides s 52, s 34 of the Act provides as follows:

> Where it is proved to the satisfaction of a court that any vessel, vehicle, article or thing seized under this Act was the subject matter of, or was used in the commission of, an offence under this Act, the court may order the forfeiture of such vessel, vehicle, article or thing notwithstanding that no person may have been found guilty of such offence.

But given that Aone and seven others had pleaded guilty to the s 15 offence and so an offence under the Fisheries Act was undoubtedly proved, the magistrate's court was more than justified in ordering, 'Bot tersebut di perintahkan untuk diserahkan untuk membuat rampasan setelah diperintah di bawah Akta Perikanan'. In the normal course, the vessel would have been forfeited, if it was there to be forfeited. And the vessel would have been there to be forfeited, if the appellant had honoured his solemn bond to produce the vessel. The reason why the appellant could not produce the vessel was brought about entirely by the appellant, because he willingly handed over the vessel entrusted to him under his solemn bond to keep safe and properly maintained at all times to others, in breach of his solemn bond. As said, the appellant could easily ensure, just by keeping the vessel with him, that the vessel would be produced whenever required, unlike a surety to the attendance of an accused at his trial or appeal who cannot be absolutely sure, despite all his effort to ensure, that the accused will surrender to his bail, and unlike such a surety who could be excused. Fairly said, there was no reason to sympathise with the appellant's plight. After all, he brought it all upon himself. And there was no reason at all to modify the prima facie position, that is that the amount for which the appellant had stood surety would be forfeited in full.

For the reasons aforesaid, this appeal is dismissed.

Appeal dismissed.

Reported by Jafisah Jaafar